

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1946 OF 2003

Gold Mohur Mills ...Petitioners

Vs.

Chandrakant Keshav Thukrul ...Respondent

Ms Meena Doshi for the Petitioner
Mr.P.M.Patel for the Respondent.

CORAM: A.S.OKA, J.
DATED: JULY 20, 2006.

ORAL JUDGMENT:

1. On the last date I have heard the submissions of the learned Counsel for the parties. By this Petition under Article 226 of Constitution of India, the Petitioner M/s.Gold Mohur Mills has taken exception to the Judgment and Order dated 30th September 1994 passed by the learned Member of the Labour Court at Mumbai. An application under sections 78 and 79 of Bombay Industrial Relations Act, 1946 was made by the Respondent. By the impugned Judgment and Order dated 30th September, 1994 passed by the Labour Court, the Petitioner was directed to reinstate the Respondent with full backwages with effect from 18th October 1983. The said order of the Labour Court was confirmed in Appeal by the Industrial Court. In this Petition Rule was issued on 25th November 2003 which is confined to the question of backwages. This Court granted stay of the direction to pay backwages subject to deposit of amount in this Court. Affidavit of one Mr.M.W.Waghmare, Deputy Manager of the Petitioner records that the respondent

has been reinstated in service with effect from 4th February 1987.

2. Mrs Doshi, learned Counsel for the Petitioner submitted that the Labour Court has passed mechanical order directing the payment of full backwages by holding that as per the normal rule the relief of backwages has to follow the order of reinstatement. She submitted that before passing the order of payment of backwages, the learned Judge has not considered the peculiar facts of the case and has not examined the issue in the light of the law laid down by the Apex Court. She invited my attention to the Affidavit of evidence of the Respondent and pointed out that the respondent has not discharged the burden of establishing that he was not gainfully employed after the order of termination till the date of reinstatement. She placed reliance on the decision of this Court in Writ Petition No.1074 of 2003 delivered on 26th April 2006. She submitted that in view of the law laid down by the Apex Court and this Court, order relating to grant of full backwages is required to be set aside.

3. Shri Patel, learned Counsel appearing for the Respondent pointed out that from the Affidavit of evidence of the Respondent it is clear that he was all along reporting for duty. He submitted that there is nothing on record to

show that the Respondent had any source of livelihood from the date of strike till the date of his reinstatement. He submitted that there are concurrent findings recorded by both the courts holding that the Respondent is entitled to reinstatement with full backwages and no interference is called for in a Writ Petition under Article 226 of Constitution of India.

4. Briefly stated, the textile mills in Mumbai were closed from 18th January 1982 due to call for strike given by the Maharashtra General Kamgar Union. According to the case of the Respondent after the intervention by the Hon'ble Chief Minister, from October 18, 1983 some workers were taken back. But the Respondent was not taken back. Therefore the Respondent applied under section 78 and 79 of the said Act of 1946. According to the case of the Petitioner, the respondent had not reported to the duty from 18th January, 1982 and therefore, he ceased to be in employment since then.

5. The learned Judge of the Labour Court in paragraph 6 of his Judgment observed thus :

"6. The employer-employee relationship between the applicant and opponent continued as opponent is action not allowing the applicant to work is illegal and void-ab-initio, hence the applicant is

entitled to the relief of reinstatement in the service. The said relief of reinstatement shall be with full back wages is the normal rule. There are no special exceptional circumstances to detract from the said normal rule. Hence, the applicant is also entitled to full back wages. In view of the settled position and in view of the ratio laid down by Hon'ble Division bench of Bombay High Court in case of National Textile Corporation (S.M.) Ltd. Vs. Shramik Janta Union reported in 1990 II CLR page 558. It is the opponent who is responsible to reinstate the applicant in the service and pay him back wages from the take over i.e. 18-10-1983. For all these reasons I answered the issue No.3 and 4 accordingly, net result led me to pass following order."

6. An Appeal was carried by the Petitioner to the Industrial Court. The Industrial Court while dismissing the Appeal held that the learned Judge of the Trial Court has rightly taken the view that when order of reinstatement is passed, order of payment of backwages is a normal rule. As observed earlier, the Labour Court has passed an order of

reinstatement with effect from 18th October 1983.

7. A reliance has been placed on the decision of the Apex Court in case of U.P.State Brassware Corporation Ltd. and Another vs. Uday Narain Pandey reported in 2006 I CLR 39. In the said decision the Apex Court has referred to its earlier Judgments on the issue of granting of backwages. In paragraph No.63 of the said decision the Apex Court observed thus:

"63. It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman."

The Apex court held that the payment of full backwages cannot be a natural consequence of passing of an order of reinstatement. The Apex Court held that the workman is not

entitled to get something only because it would be lawful to do so. The Apex court, therefore, held that it is not for the employer to raise plea that the workman was gainfully employed. Thus, the view taken by the Apex Court is that the backwages cannot be granted is a matter of course.

8. The courts below have not given any reason for granting full backwages and the backwages have been awarded on the ground that it was a normal rule. The perusal of the Affidavit of evidence of the respondent shows that there is not even a statement that from the date of termination of employment, he was not gainfully employed and that he was not having any source of livelihood.

9. The learned Counsel for the Petitioner submitted that the Respondent has not discharged the burden. The learned Counsel for the Respondent tried to submit that there is no cross examination of the Respondent on this aspect. In my view, this is not relevant as the Respondent had not come out with a case that after termination he was not employed or was not having any source of livelihood.

10. The learned Counsel for the Petitioner has relied upon the decision of the learned Single Judge of this Court in case of Finlay Mills Vs. Mrs. Supriya S. Ghugare. In the said case, after considering the ratio laid down in the case

of U.P.State Brassware Corporation Ltd. (supra), the learned Single Judge has set aside an order for payment of full backwages and directed that the workman was entitled to 30% of the backwages from the date of filing the complaint.

11. In the present case there is a finding recorded by the learned Judge of the Labour Court as well as the Industrial Court that the Respondent is entitled to reinstatement. In the copy of the application made by the Respondent which is annexed to the Petition, the date on which approach notice was given is not mentioned. Date of approach notice is not on record. In my view, even if the back wages are to be granted, the same should be from the date of approach notice. The learned Member of the Labour Court has granted the back wages with effect from 18th October 1983 i.e. from the date on which the management of the undertaking was taken over by the Central Government. Considering the period of limitation for making the application, it is obvious that the approach notice must have been given in the period between June 1985 to 1st October 1985. The Respondent cannot be granted backwages from 18th October, 1983. The backwages should have been awarded from 01st October, 1985 i.e. the date of filing Application in absence of the record showing the date on which approach notice was given.

12. The learned Counsel for the Petitioner invited my attention to the decision of the Single Judge in case of Finlay Mills in which direction was given to the employer to pay 30% of the full back wages to the workman. The learned single Judge has given reasons for awarding 30% of the back wages in paragraph 18 of his Judgment. The learned Single Judge noted that in the litigation there was an order of remand passed by the High Court and that was the reason for delay in decision. He observed that the employee was out of employment from 1980 and almost 24 years have been passed from the date of termination. The learned Single Judge granted backwages from 1st January 1996 as approach notice was sent on 22nd December 1995. In the present case, the case of the Respondent is that cotton mill reopened from March 1984 and from that date the Respondent attempted to resume his duties but he was not taken in the employment. In my view, considering the facts and circumstances of the case, 40% of the backwages are required to be awarded with effect from 1st October 1985. the impugned Judgement and Award will have to be modified to the aforesaid extent.

13. Hence, Petition is dismissed by passing the following order :

- i) Clause No.(ii) of the operative part of the impugned order passed by the learned Member of the Industrial Court is substituted by following :

- "a) The Appellant-Company is directed to pay to the Respondent 40% of the backwages with effect from 1st October 1985 to 04th February, 1997."
- (ii) The amount of backwages has been deposited in this Court. The Respondent will be entitled to withdraw back wages as aforesaid and the balance amount shall be refunded to the Petitioner.
- (iii) The Petitioner and the Respondent will be entitled to interest, if any, accrued on the amount deposited in this court in the proportion of 60% and 40% respectively. Necessary calculation will be submitted by the Petitioner within a period of eight weeks from today. Liberty to apply.
- (iv) Rule is made partly absolute in above terms. No order as to costs.

Judge.